No. 12,659

United States Court of Appeals

For the Ninth Circuit

EDWARD COFFEY,
Appellant,

vs.

ANTONIO POLIMENI,
Appellee.

APPELLANT'S REPLY BRIEF.

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PRELIMINARY STATEMENT.

In our opening brief we contended that even if defendant were negligent he was entitled to judgment as a matter of law because an action does not lie for mere delay in acting on an insurance application, there being no legal duty which is breached. We recognized that there is a conflict of authority on the point but we maintained that the sound rule is the one which denies a right of action. We also contended that the doctrine which affirmed such a cause of action appeared to be limited to cases in which the premium had been paid or arranged for, which was not done in the case at bar; furthermore that the trial court found no contract in this case, and thereby cut off the alleged basis for defendant's obligation; and

finally that the sole cause of plaintiff's loss in this case was his own inaction after he had learned by defendant's letter of June 4th that defendant would do nothing in the absence of further information.

We think that the last mentioned point is so clearly decisive that it alone disposes of the case without reference to the other points including the general question whether such an action ever lies. However, since appellee has cited a number of authorities on the latter question, we are moved to respond to them.

Our position, therefore, is this:

First, that the sound doctrine is that there is no liability for delay in acting on an insurance application;

Secondly, that even if the authorities which uphold such liability were to prevail, for the reasons stated they would not sustain the judgment in favor of plaintiff in this case.

Within the framework of these contentions we will respond to the arguments in appellee's brief.

I.

THE SOUND DOCTRINE IS THAT THERE IS NO RIGHT OF ACTION FOR DELAY IN ACTING ON AN INSURANCE APPLICATION.

It must be remembered that we are speaking of the liability of an agent for the insurance company, not an agent for the applicant. Obviously, there is a fundamental difference between the situation on the

one hand of an agent who fails to carry out the task which he agreed to perform for his principal, who is an applicant for insurance, and the situation on the other hand of an agent for the insurance company who stands at arm's length toward the applicant.[1]

There are cases which hold that where an agent for an insurance company receives an application for insurance and delays forwarding it to the company, and the risk was actually acceptable but remained uninsured because of the agent's delay, the insurance company may be held liable in tort to the applicant for damages for failure to insure.[2] The right of action is not based on the contract, because no such contract exists, but it is based on the negligence which prevented the contract from coming into being.

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[1]Appellee states that appellant had acted as broker or agent for appellee on two prior occasions (Brief for Appellee, p. 13). If the object is to intimate that appellant was agent for appellee in this transaction, it fails. The portions of the transcript referred to (pp. 240, 242) do not indicate whether appellant had been agent for appellee or for the insurance company in the previous transactions. Even if he had been appellee's agent in those transactions, that fact would not have determined his status in the present instance. In the present case he is clearly being treated as agent for the insurance companies which he represents. The complaint alleges his status as "a general insurance agent" (Par. II, first count, R. 2); it alleges that plaintiff applied "to defendant" for insurance (Par. III, first count, R. 2); it refers to "the insurance companies represented by defendant" (Par. VI, first count, R. 3; Par. IV, second count, R. 5); and it alleges that plaintiff "made no attempt to procure fire insurance from any insurance agent other than defendant" (Par. IX, first count, R. 4; Par. VI, second count, R. 5, 6). The arm's length relationship is also disclosed in the correspondence (R. 166 to 175).

[2]In almost all the cases dealing with this situation, the suit is brought against the insurance company rather than the agent. However, the same test of liability applies to both the insurance company and its agent because where the insurance company is held it is because of the negligence of the agent.

While some of the cases cited by appellee are irrelevant,[3] others of them constitute declarations of this rule.

The question immediately arises, how can such liability be asserted in view of immemorial principles of the law of tort? For it is elementary that for tort liability there must be a duty, a breach of that duty, and damages proximately resulting therefrom.

What is the duty in this instance? An application for insurance is an offer to contract. An offeree may accept or reject. He may reject expressly or by inaction. Therefore the cases which hold the insurance companies liable for inaction concede that there is no contract and fix the liability only in tort. But in that case how does the duty arise? It is not created by law, because there is no statute to that effect. It is not created by contract, because there is no contract. What other ground for it is there?

There is no real answer to that question. And the fact that there is no real answer is the basis for the line of decisions which hold that the asserted right of action does not exist. Representative of this line of cases are the following:

Munger v. Equitable Life Assur. Soc. (1933), 2 Fed. Supp. 914;

Schliep v. Commercial Casualty Ins. Co. (1934), 191 Minn. 479, 254 N.W. 618;

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[3]These were cases where there was a contract to insure, or where the party who was held liable was the agent of the applicant for insurance, not of the insurance company.

Tjepkes v. State Farmers' Mutual Ins. Co. (1935), 193 Minn. 505, 259 N.W. 2;

Zayc v. John Hancock Mutual Life Ins. Co. (1940), 338 Pa. 426, 13 Atl. (2d) 34;

Savage v. Prudential Life Ins. Co. of Amer. (1929), 154 Miss. 89, 121 So. 487;

Thornton v. National Council (1931), 110 W. Va. 412, 158 S.E. 507;

Swentusky v. Prudential Ins. Co. (1933), 116 Conn. 526, 165 Atl. 686.

Metropolitan Life Ins. Co. v. Brady (1930), 95 Ind. App. 564, 174 N.E. 99;

National Union Fire Ins. Co. v. School District (1916), 122 Ark. 179, 182 S.W. 547;

Miller v. Hanson (1943), 69 S. D. 218, 8 N.W. (2d) 927.

Reference to a few of these decisions will indicate their reasoning.

Munger v. Equitable Life Assur. Soc., supra, contains a thorough critique by District Judge Otis of the doctrine that such an action lies. Judge Otis considers all the grounds for tort liability which are asserted in the various decisions and demonstrates their inadequacy. These grounds, and Judge Otis's responses, are:

1. The equitable principle which considers done what ought to have been done.

This assumes, says Judge Otis, what must be proved, namely, that the application should have been acted upon. If it supports anything, it supports an

action in equity, not at law; and if a law action, one in contract, not tort.

2. The insurance company has a state franchise.

Every corporation has a franchise, but that does not alter elementary law of contract by requiring a corporation to act on offers more promptly than an individual.

3. Good faith makes the insurance company or agent a trustee to return the premium if the application is not accepted.[4]

If this is so, the full duty is to return the premium. The assumption that the trustee has agreed to act one way or the other on the application begs the question whether there is such a duty. Moreover, the enforcement of a trust, with incidental damages, is for equity, not law.

4. The claimed duty arises from the obligation of good faith and fairness and from the public interest involved in the insurance business.

If there is any obligation, it is moral. Neither by statute nor common law is it a legal obligation. In the absence of a statute, the courts must not convert it into a legal one.

The public interest is relevant only to police power, and police power is exercised by the legislature, never by the courts.

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[4]No premium was paid or tendered in the case at bar; but the decisions here discussed hold that there is no liability even where premium has been paid.

For brevity, we have greatly compressed Judge Otis's opinion. We respectfully refer this Honorable Court to the opinion as a thorough study of the question.

In *Savage v. Prudential Life Ins. Co., supra,* the court said (121 So. 489) it was "unable to perceive how an action may be maintained in tort which so clearly cannot be maintained on any theory in the contract." It said that the factor of public interest was for the legislature and that unless the legislature should act, the court "is without the power or the desire to trench upon legislative authority."

In *Swentusky v. Prudential Life Ins. Co., supra,* the court (165 Atl. 687, 688) discusses the contention that insurance companies possess franchises and are charged with a public interest, and points out that if because of those facts alone the courts were to impose different tests of liability it would expose the law to chaos. It is not true to say that negligence can only arise where there is a prior legal relationship between the parties. On the contrary, the duty to exercise care arises whenever the activities of two persons come so in conjunction that negligence by one is liable to cause injury to the other, and within this broad principle might conceivably come the applicant for insurance and insurance company agent. But this is subject to limitations. The court continues, "It is a thoroughly established principle of the law of contracts, within the field of which insurance largely lies, that ordinarily a bare offer imposes no liability * * * until it is

accepted * * *" If the offeree neglects it because it is unacceptable or because he has forgotten it, the only result is that there is no contract. This limits the broad doctrine of negligence which might otherwise apply. The court concedes that failure of the insurance company to act may cause loss to applicant, but it says that that is not peculiar to insurance law. For example, "one may make an offer to buy goods * * * at a certain price, having reason to believe the price will advance, and may incur loss through the failure (of) the one to whom it is made to act upon the offer within a reasonable time."

In *Thorton v. National Council, supra,* the court after stating that the contract of insurance is subject to the general principles of contract and that mere inaction does not create insurance, says (158 S.E. 508), "Yet the theory advanced by appellee, in making the insurer responsible in damages for the amount of the policy because of delay, would accomplish by indirection that which the law will not permit to be done directly." The court then mentions the argument from public interest, and says, "No reason is apparent why an insurance contract should be regarded as of any more interest to the public than a contract of employment." "It is of as much importance to the public that a person and his dependents have support during his lifetime (by wages or salary) as that his beneficiaries have a competency (through insurance) after his death. Yet it has never been held that delay in passing upon an application for employment affected the public interest to the extent that it made

the employer liable for all damages arising from such delay."

In *Schliep v. Commercial Casualty Ins. Co., supra,* the court says (254 N.W. 622) that the reasoning of the foregoing cases appeal to it "as more consonant with reason and established legal principles than those advanced by the courts upholding plaintiff's theory." It then says, "it is apparent that if liability is here to be imposed in an action ex delicto this court will be compelled to engage in judicial legislation. If and when it is desired to impose upon insurers additional burdens or requirements, the same should come through the legislative department of the government and not by virtue of judge-made law."

The late case of *Miller v. Hanson, supra,* considers the two conflicting lines of cases and says (8 N.W. (2d) 927), "The courts which have imposed liability on the theory of tort present strong social or ethical reasons for charging an insurance company with a duty to act promptly on such an application but fail to convince us that the essential legal duty so to do exists. It is elementary that an action ex delicto is founded upon a breach of duty." The court then concurs in the above quoted language of the *Schliep* case.

Finally, this Honorable Court will find the two lines of cases discussed in *Zayc v. John Hancock Mutual Life Ins. Co., supra,* which was cited in our opening brief. The court in that case (13 Atl. (2d) 36-38) discussed the arguments in favor of a negligence action and found them wanting. Regarding the argument

that an insurance company acts under a state franchise, it said the same is true of other companies similarly related to the public and yet this proposed change in the law of contracts would relate to insurance companies alone. Regarding the social desirability of insurance protection, it said this furnishes "no sufficient legal basis for the imposition upon insurance companies, by a court mindful of the limitations upon its proper functions, of duties or liabilities having no sanction in the established principles of law or in the statutes governing the business."

The foregoing is a swift summary of the decisions which in our judgment represent the sound rule on this subject. Our opinion in this respect is shared by the noted authority on the law of torts, William L. Prosser, now Dean of the University of California School of Jurisprudence. In a thorough article on this subject, which appeared in 3 *University of Chicago Law Review* 39 under the title "Delay in Acting on an Application for Insurance", Mr. Prosser cited the authorities on both sides of this question. Like Judge Otis, the author of the article then separately analyzed every ground which the courts have asserted as a basis for liability in this situation and found them wanting.[5]

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[5]In his article in the Chicago Law Review, Dean Prosser says, after reviewing the various authorities on the subject, "The infinite variety of these legal theories, not yet withered by age or made stale by custom, suggests that there is no real logical basis for liability, and that the recent cases which have denied it are those which ultimately will be followed. If there is 'a great need for the courts to recognize the position of guardian-

We submit, therefore, that the doctrine embodied in the line of authorities that we have cited is the sound rule in this matter. Applied to the case at bar, this rule calls for a judgment in favor of defendant, as a matter of law. For here, even if plaintiff's letter of April 17th be liberally construed as an "application" for insurance, it remained unaccepted, and by virtue of the doctrine just described there was no basis for liability and no question for the jury. In other words, the issues presented to the jury by the trial court's instructions numbered 3 and 4 (R. 44, 45) were fictitious ones, and instead of giving such instructions the court should have dismissed the case or directed a verdict for defendant.

However, even if this Honorable Court should adopt the opposite doctrine which imposes liability for failure to act on an insurance application, appellant contends that he would nevertheless be entitled to judgment, for any one of three reasons, which we will now state.

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ship occupied by the insurer in society and to endow the insurer with a responsibility for efficient action greater than is required of the corner grocer', it should at least be done outright by judicial fiat, instead of warping established concepts to produce a 'novel, interesting and rather surprising' result. It would perhaps be better still to leave such legislation where it properly belongs, and to solve the problem by the passage of statutes similar in character to that of North Dakota." 3 *University of Chicago Law Review*, pp. 58, 59.

II.

EVEN IF AN ACTION WERE TO LIE FOR DELAY IN RESPONDING TO AN APPLICATION, THERE IS NO LIABILITY ON DEFENDANT IN THE PRESENT CASE.

A. No premium paid.

In practically all the cases in which the insurance companies were held liable, the applicant had paid the first premium or had arranged for its payment. This is often stressed. Courts have said that failure to return a premium promptly creates an implied agreement to insure or renders it unfair to deny insurance. It appears extremely doubtful that the line of decisions would have arisen if it had not been for the payment of the premium in those cases. We think it therefore predictable that ultimately even the courts which uphold this type of action will graft upon the doctrine the distinction that the doctrine applies only in cases where the premium has been paid or arranged for. In our case there was no payment or provision for the premium. There was a mere presentation of information.

Appellee has made no response to this point in his brief.

B. No contract existed.

Plaintiff based his case on contract, in both counts. In his second count he sues for breach of the contract (R. 4 to 6). In the first count, he sues for negligent failure to carry out the contract. Thus even the tort count is *based* upon contract. The allegation is contained in paragraph III of the first count, which reads:

> "That on the 30th day of March, 1948, plaintiff applied to defendant by letter for insurance against loss or damage by fire upon the above-described property, and defendant, on the 9th day of April, 1948, acknowledged that application by letter and requested a description of the said property, *promising plaintiff upon receipt thereof, to supply* the insurance desired by plaintiff." (Emphasis supplied) (R. 2, 3).

But the trial court found that no contract existed (R. 31). Thus there was a failure of proof of the basis of the action.

In his brief, appellee does not respond to the point of lack of contract. True, he cites some authorities which uphold an action for negligence. But as seen above, those authorities do not base the negligence on non-performance of a contract; they base it on the relationship between the parties and various factors other than contract. Appellee based the alleged tort upon a contract, and since there was no contract there is no basis for a judgment in his favor.[6]

C. The June 4th letter.

The fire occurred July 20th. On June 4th appellant wrote appellee showing that appellant was not going to write the insurance until the requested information was supplied. As far as appellee's reliance is concerned, it makes no difference that appellant had in its files appellee's letter of April 17th supplying

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[6]Appellee says he offered to prove that in a previous discussion appellant had agreed to procure this insurance (Brief for Appellee, p. 14). The answer to that is that the offer was declined by the court (R. 320).

the information or that appellant had been negligent in mislaying the letter. The significant thing is the applicant's state of mind. Therefore even if this Honorable Court should hold that an action lies for delay in responding to an insurance application, appellee's knowledge of appellant's intention in this case is decisive. This can be easily demonstrated.

Suppose that on June 4th, appellant had advised appellee that insurance was refused. Appellee would have had over a month to seek insurance elsewhere. If he had done nothing, the risk would have been his by his own volition, and appellant could not have been liable under any rule that might be adopted. Any antecedent negligence of appellant, if there had been such, would have been completely superseded. It would not be a case of appellant escaping liability on the ground of *contributory negligence* of the appellee; appellee's decision would have been the *sole* cause of his loss. In the respect here involved, appellant's letter of June 4th had the same effect as a refusal of insurance. It showed appellee that appellant was going to do nothing further unless he should hear from appellee. And appellee ignored the letter.

Or another test may be adopted. Suppose that appellant had insured the property promptly after receiving appellee's letter of April 17th. And suppose that on June 4th appellant had sent appellee a written notice of cancellation (these policies contain a standard provision permitting the insurance company to cancel the insurance by giving five days' written notice to the insured). If, as in the present case,

appellee did nothing after getting such a notice, he would have been uninsured by his own choice at the time of the fire. There would have been no possible basis for holding the insurance company or its agent. By failing to do anything after receiving the letter which appellant sent to him on June 4th, appellee placed himself in the same position as omitting to reinsure after getting a notice of cancellation.

Appellee's response to this point is that this contention amounts only to an argument with the verdict of the jury on the question of contributory negligence and the question whether appellant's delay was the proximate cause of appellee's loss (Brief for appellee, p. 16).

But we are arguing this case as a matter of law, not of fact. We say that the case should not have been submitted to the jury unless under a direction to give a verdict for defendant. We say that the deliberate failure of appellee to do anything after receiving the letter of June 4th was the undisputed sole cause of his loss. It was not contributory negligence; it was the sole cause of the damage.

We think that this contention is so clearly decisive that the case may be disposed of upon this point alone, although as we have said, we think the better rule does not permit this type of action in any event.

CONCLUSION.

Appellee devotes considerable space to showing that appellant's office was negligent in failure to insure. We have not argued that point. All our contentions are consistent with an admission of negligence.

As to proof of damage, we have nothing to add to the contentions contained in our opening brief.

For the reasons stated, we respectfully submit that the judgment should be reversed as a matter of law and that judgment for defendant be directed.

Dated, Anchorage, Alaska,
March 26, 1951.

Respectfully submitted,
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